The provisions of subpart H of part 1201 shall govern any proceeding for attorney fees and expenses.

§ 1208.26 Appeals under another law, rule, or regulation.

(a) The VEOA provides that 5 U.S.C. 3330a shall not be construed to prohibit a preference eligible from appealing directly to the Board from any action that is appealable under any other law, rule, or regulation, in lieu of administrative redress under VEOA (5 U.S.C. 3330a(e)(1)). An appellant may not pursue redress for an alleged violation of veterans' preference under VEOA at the same time he pursues redress for such violation under any other law, rule, or regulation (5 U.S.C. 3330a(e)(2)).

(b) An appellant who elects to appeal to the Board under another law, rule, or regulation must comply with the provisions of subparts B and C of 5 CFR part 1201, including the time of filing requirement of 5 CFR 1201.22(b)(1).

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING OR OTHER PROTECTED ACTIVITY

Subpart A—Jurisdiction and Definitions

Sec.

Subpart B—Appeals

Subpart C—Stay Requests

Subpart D—Reports on Applications for Transfers

Subpart E—Referrals to the Special Counsel

AUTHORITY: 5 U.S.C. 1204, 1221, 2302(b)(8) and (b)(9)(A)(i), (B), (C), or (D), and 7701.

SOURCE: 55 FR 28592, July 12, 1990, unless otherwise noted.

Subpart A—Jurisdiction and Definitions

§ 1209.1 Scope.

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant's whistleblowing or other protected activity activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing or other protected activity, and requests for stays of personnel actions allegedly based on whistleblowing or other protected activity.

[78 FR 39546, July 2, 2013]

§ 1209.2 Jurisdiction.

(a) *Generally.* Under 5 U.S.C. 1221(a), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing or other protected activity.

(b) *Appeals authorized.* The Board exercises jurisdiction over:

(1) *Individual right of action (IRA) appeals.* These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing or other protected activity. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

Example 1: An agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he reported that his supervisor embezzled public funds in violation of Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Employee X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Employee X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal.

Example 2: As above, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days. Whether the Board would have jurisdiction to review Employee X's performance rating as an IRA appeal depends on whether his previous Board appeal involved a claim of retaliation for whistleblowing. If it did, the Board could review the performance evaluation in an IRA appeal because the employee has alleged a violation of 5 U.S.C. 2302(b)(9)(A)(i). If the previous appeal did not involve a claim of retaliation for whistleblowing, there might be a prohibited personnel practice under subsection (b)(9)(A)(ii), but Employee X could not establish jurisdiction over an IRA appeal. Similarly, if Employee X believed that the current performance appraisal was retaliation for his previous protected equal employment opportunity (EEO) activity, there might be a prohibited personnel practice under subsection (b)(9)(A)(ii), but Employee X could not establish jurisdiction over an IRA appeal.

Example 3: As above, an agency gives Employee X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Employee X believes that the agency has rated him ''minimally satisfactory'' because he testified on behalf of a co-worker in an EEO proceeding. The Board would have jurisdiction over the performance evaluation in an IRA appeal because the appellant has alleged a violation of 5 U.S.C. 2302(b)(9)(B).

Example 4: Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Employee Y files a complaint with OSC alleging that the proposed removal was initiated in retaliation for her having disclosed that an agency official embezzled public funds in violation of Federal law and regulation. OSC subsequently issues a letter notifying Employee Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. Employee Y may file an IRA appeal with respect to the proposed removal.

(2) *Otherwise appealable action appeals.* These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing or other protected activity. Otherwise appealable actions are listed in 5 CFR 1201.3(a). An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section.

Example 5: Same as Example 4 above. While the OSC complaint with respect to the proposed removal is pending, the agency effects the removal action. OSC subsequently issues a letter notifying Employee Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. With respect to the effected removal, Employee Y can elect to appeal that action directly to the Board or to proceed with a complaint to OSC. If she chooses the latter option, she may file an IRA appeal when OSC has terminated its investigation, but the only issue that will be adjudicated in that appeal is whether she proves that her protected disclosure was a contributing factor in the removal action and, if so, whether the agency can prove by clear and convincing evidence that it would have removed Employee Y in the absence of the protected disclosure. If she instead files a direct appeal, the agency must prove its misconduct charges, nexus, and the reasonableness of the penalty, and Employee Y can raise any affirmative defenses she might have.

(c) *Issues before the Board in IRA appeals.* In an individual right of action appeal, the only merits issues before the Board are those listed in 5 U.S.C. 1221(e), *i.e.*, whether the appellant has demonstrated that whistleblowing or other protected activity was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the whistleblowing or other protected activity. The appellant may not raise affirmative defenses, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512,